

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

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CG Docket No. 02-278

**REQUEST FOR EXPEDITED CLARIFICATION**

**PROXIMITY MARKETING**

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August 6, 2003

## SUMMARY

Proximity Marketing requests the Commission to issue an expedited clarification of the *Report and Order* and amended rules and policies adopted in this proceeding to implement the Telephone Consumer Protection Act of 1991 (“TCPA”), concerning unsolicited facsimile advertising. The Commission’s reversal of its prior determination, that companies having an established business relationship possess the requisite consent to send faxes to their customers or clients, and its amended rule requiring signed written consent to receive such faxed communications, will, absent immediate clarification or a stay, result in significant disruption and economic harm to the hundreds or more publishers of Requester Publications and other related businesses. Proximity Marketing is concurrently requesting a stay of the new rules pertaining to unsolicited facsimile advertising as applied to Requester Publications in the event the Commission fails to grant this request for clarification before the August 25, 2003 effective date of the *Report and Order*.

Requester Publications generally are specialized trade or business publications provided at no charge to subscribers that have demographic characteristics indicating they have an interest in the publication’s subject matter. If the new rules governing unsolicited facsimile advertising apply to communications with subscribers of Requester Publications, the Commission will have radically altered the regulatory landscape for this industry affecting millions of individual subscriptions, while providing only 30 days in which to adjust – a virtually impossible task.

The TCPA prohibits only the transmission of “an unsolicited advertisement to a telephone facsimile machine.” It does not prohibit other faxed communications. Under the TCPA, an “unsolicited advertisement” is “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that

person's prior express invitation or permission.” The key elements of this definition are whether the facsimile makes something known with the intent or for the purpose of selling the item advertised. The focus is on activity seeking to promote the purchase or sale of a good, product or service. Faxed communications to subscribers concerning a publication they requested and receive for free are not within this definition.

The recipient of the facsimile renewal notice is plainly already aware of the publication since they already receive it at no charge. Rather than “advertising” the “commercial availability” of a publication, a faxed renewal reminder represents an exchange of business information. The publisher is reminding the subscriber that his or her subscription is about to expire. The subscriber, in turn, is notifying the publisher of his or her desire to continue to receive the publication and is providing the needed responsive information. There is no purchase or sale.

In an analogous context, the Commission has said that telemarketing messages that invite a consumer to listen to or view a free (*e.g.*, over-the-air) radio or television broadcast do not include or introduce an unsolicited advertisement or constitute a telephone solicitation. The Commission recognizes that a communication with a consumer may have a commercial purpose but not constitute advertising. There is no rational basis to distinguish an invitation to view or listen to a free radio or television broadcast, from a notice to the subscriber of a free publication that his or her subscription is about to expire and which invites the subscriber to continue receiving the publication. In both cases, the viewer, listener or subscriber is neither required nor encouraged to purchase any good, product or service.

There is no reasonable basis for characterizing such communications as “unsolicited facsimile advertising” as that term is defined in the TCPA and the Commission’s Rules.

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**REQUEST FOR EXPEDITED CLARIFICATION**

Proximity Marketing hereby requests the Commission to issue an expedited clarification of the *Report and Order* and amended rules and policies concerning unsolicited facsimile advertising adopted in this proceeding.<sup>1</sup> These new rules and policies implement the Telephone Consumer Protection Act of 1991 (“TCPA”).<sup>2</sup> The Commission’s reversal of its prior determination, that companies having an established business relationship possess the requisite consent to send faxes to their customers or clients, and its amended rule requiring signed written consent to receive such faxed communications, will, absent immediate clarification or a stay, result in significant disruption and economic harm to hundreds, if not thousands, of publishers of magazines and other periodicals (“Requester Publications”) circulated at no charge (free) to subscribers, as well as other related companies.

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<sup>1</sup> See *Report and Order, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 03-153, released July 3, 2003. A summary of the *Report and Order* was published in the Federal Register on July 25, 2003, 68 FR 44144.

<sup>2</sup> Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. Section 227.

Absent immediate Commission action, the new rules generally will become effective August 25, 2003.<sup>3</sup> As discussed below, the question now arises whether the new rules governing unsolicited facsimile advertising apply to communications with subscribers of Requester Publications.<sup>4</sup> If the rules do apply, the Commission has radically altered the regulatory landscape for this industry while providing only 30 days in which to adjust – a virtually impossible task.<sup>5</sup>

Proximity Marketing is simultaneously filing a Request for Stay of the *Report and Order* as it may apply to Requester Publications.<sup>6</sup> If the Commission fails to grant this Request for Clarification (*i.e.*, that the TCPA does not apply to faxed communications used to verify subscriber information for Requester Publications) prior to August 25, the Commission should stay the effective date of the new rules until the later of six months from August 25, 2003, or Commission action on petitions for reconsideration of the *Report and Order*. Such a stay would provide a more reasonable time period for publishers and related businesses (such as Proximity Marketing) to implement procedures consistent with the new regulatory landscape.

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<sup>3</sup> See 68 FR 44144, at 44176-77 (effective date of *Report and Order* is August 25, 2003, except for certain provisions, including those which contain information collection requirements subject to Office of Management and Budget (“OMB”) approval and for which the Commission will subsequently announce the effective date.). Amended Section 64.1200(a)(3)(i), which contains the new requirement for a signed, written statement expressly inviting or permitting facsimile advertisements to the recipient is one of the provisions subject to OMB approval.

<sup>4</sup> Magazines or other publications provided at no charge to subscribers are also known as “controlled circulation” publications.

<sup>5</sup> The August 25 effective date is 30 days after Federal Register publication. See *Report and Order* at para. 222. Although the effective date of Section 64.1200(a)(3)(i) may be longer than this 30-day period (depending on when OMB approval is obtained), for all practical purposes the changes in the rules governing facsimile advertising are effective August 25, as that is the effective date of the elimination of the established business relationship exemption.

<sup>6</sup> Section 1.44(e) of the Commission’s Rules requires that a request to stay the effective date of any Commission decision or order be filed as a separate pleading.

However, if the Commission grants this Request for Clarification and confirms that faxed communications to confirm subscriber information are not unsolicited advertising under the TCPA, such action would moot the need for a stay.<sup>7</sup>

## INTRODUCTION

Requester Publications generally are specialized trade or business publications provided at no charge to subscribers that have demographic characteristics indicating they have an interest in the publication's subject matter.<sup>8</sup> There are approximately 4,000 such publications nationwide. They typically have anywhere from 15,000 to 250,000 subscribers per publication. These publications generally rely solely on revenue from advertisers who want to market their products and services to a highly specialized and qualified demographic group.

Subscribers to these publications are obtained in several ways, including telemarketing, direct mail, and Internet web sites. With respect to telemarketing, publishers will contact potential subscribers, describe the magazine and the benefits or value derived from receiving the publication, and ask if the business professional would like to receive the publication at no charge. If a person indicates they would like to receive the publication, they are asked to verify their mailing address and usually asked to provide their e-mail address, fax number and other relevant information. They also are asked to provide a personal "verifier" (*e.g.*, information that is unique to the new subscriber). In addition to telemarketing, publishers will send direct mail

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<sup>7</sup> Proximity Marketing is aware that at least two other parties have already requested stays of the new rules adopted in the *Report and Order*. See Petition for Stay filed July 25, 2003 by the American Society of Association Executives, and the Request for Expedited Stay filed July 25, 2003 by American Teleservices Association. Proximity Marketing takes no position on these requests.

<sup>8</sup> U.S. Postal Service regulations define a Requester Publication as a publication that is circulated free or mainly free of charge. See 39 C.F.R. Part 3001, Subpart C, Appendix A, Section 413.1.

pieces to potential subscribers that can be filled out and returned to the publisher to initiate a subscription. Subscribers also sign up for these publications via the publisher's web site, filling out the requisite information on-line.<sup>9</sup>

Requester Publications are a specific category of publication that is entitled to lower Periodical mailing rates under U.S. Postal Service regulations.<sup>10</sup> To qualify as a Requester Publication, the Postal Service requires publishers to have written proof that 50% or more of the copies of the publication are distributed to subscribers requesting the publication.<sup>11</sup> Postal Service regulations require a written showing to be filed with the Postal Service annually.<sup>12</sup> In addition, there are independent, not-for-profit, self-regulating organizations that audit and verify circulation data of Requester Publications for advertisers and other industry representatives.<sup>13</sup> These audits are important part of the industry as they allow advertisers to confirm that a specific publication is reaching the targeted demographic group.

Qualification for Requester Publication status and the lower Periodical postage rate is critical for publishers trying to minimize their operating costs. Thus, it is important that

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This Request for Clarification, and Proximity Marketing's concurrent Request for Stay, address only those publications which are provided free of charge to some or all of their subscribers.

<sup>9</sup> Although a publisher may, as a last resort, purchase a directory that fits the publication's subscriber profile and add those names to receive the publication, this is infrequently used. Advertisers do not want to see "invented" circulation numbers, and such subscribers would not, as discussed *infra*, help the publisher qualify for postal rate discounts. Further, publishers generally do not communicate with these people by facsimile because they know there is not an existing business relationship, unlike subscribers who have affirmatively indicated they want to receive the publication.

<sup>10</sup> See generally 39 C.F.R. Part 3001, Subpart C, Appendix A, Section 411.1. The Periodical mailing rate is substantially less than the first class or standard mail rate. See e.g., <http://pe.usps.gov/text/dmm/r200.htm> (periodical postage rates).

<sup>11</sup> See 39 C.F.R. Part 3001, Subpart C, Appendix A, Section 413.41.

<sup>12</sup> See 39 U.S.C. Section 3685(a)(4).



publishers have and maintain written documentation of a request for the publication from its subscribers. Publishers annually expend significant personnel and financial resources to obtain and maintain the required documentation showing subscribers' requests to receive the publications.<sup>14</sup>

The methods used to confirm that subscribers have requested a publication include a combination of faxed communications, e-mail, telephone and direct mail. For many publications, the most effective of these is faxed communications.<sup>15</sup> Faxed communications include a notice from the publisher to the subscriber explaining that his or her subscription is about to expire and requesting the subscriber to confirm that he or she wants to continue receiving the publication. These communications also request the subscriber's contact information (*e.g.*, telephone number, fax number and/or e-mail address), and updated business and demographic information. Subscribers complete the information and fax it back to the publisher. These faxed communications are delivered only to existing subscribers of the publication, and only to subscribers who have previously requested to receive the publication. The faxed responses provide the requisite documentation required by the Postal Service and satisfy independent audit requirements.

Other methods of contacting subscribers for their renewal information are likely less effective and more costly than faxed communications. These include telephone contact, e-mail

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<sup>13</sup> The largest of these for Requester Publications is BPA International (home page at <http://www.bpai.com>). Another is the Audit Bureau of Circulations (ABC) (home page at <http://www.accessabc.com>).

<sup>14</sup> Although an individual subscriber's desire to continue to receive a publication must be reconfirmed at least every three years, the actual length of a subscription will vary from publication to publication. Publishers generally contact their subscribers on a staggered schedule so that not all subscribers are contacted at the same time.

and direct mail. However, faxed communications are likely the most cost effective and efficient method of communicating with the subscribers. The cost for faxed communications is usually a fraction of the cost associated with telemarketing or direct mail communications.<sup>16</sup> Unlike a typical store-front business, publishers do not have personal contact with their subscribers.<sup>17</sup>

Many publishers retain the services of an independent marketing company to assist in coordinating their communications with subscribers. Proximity Marketing is such a company. Proximity Marketing is an electronic direct marketing company that specializes in developing and coordinating fax, e-mail and web-based communications campaigns for the magazine publishing market. Its services to clients include circulation renewal programs, editorial survey programs, directories and buyer's guide updates, and marketing and promotion campaigns. Magazine circulation renewal programs for Requester Publications are a substantial percentage of Proximity Marketing's business. Proximity Marketing is a small business under SBA guidelines.

The Commission's *Report and Order* and new regulations governing unsolicited faxed advertising, if applicable to faxed communications from Requester Publications seeking subscriber renewal information, would have a devastating impact on the Requester Publication industry. They would adversely affect publishers and the marketing companies that assist publishers. These concerns did not exist before the Commission's *Report and Order* pursuant to

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<sup>15</sup> The exact percentage of subscriber responses to faxed communications will vary from publisher to publisher. In some instances as many as 50% of a publication's renewal authorizations come from faxed communications.

<sup>16</sup> For example, GIE Media, the publisher of several trade magazines with over 100,000 subscribers, reports that the cost of faxed renewal notices is about \$.60 for each faxed response, whereas the average cost for each telephone verification is \$3.75. See letter dated August 1, 2003, from Heidi Spangler, Director, Circulation and Database Operations, GIE Media, Inc., to Chairman Michael K. Powell, a copy of which is contained in Exhibit A hereto.

the Commission’s prior conclusion that faxed transmissions “from persons or entities that have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient.”<sup>18</sup> Because existing subscribers who have requested to receive a publication have an established business relationship with the publisher, the publisher could send faxed communications to those subscribers under the Commission’s prior interpretation of the TCPA.

However, the Commission’s reversal in the *Report and Order*, and new conclusion that an established business relationship does not provide the requisite consent to send faxed advertising to clients or customers, now raises the question: Does a faxed communication from a publisher to the subscriber of a Requester Publication (who receives a free subscription), asking the subscriber to confirm his or her desire to continue receiving the publication free of charge, constitute an unsolicited faxed advertisement under the TCPA? The answer to this question is not clear from the face of the *Report and Order* or the Commission’s amended rules.<sup>19</sup> For the reasons discussed below, such communications are not unsolicited advertisements subject to the TCPA’s prohibition. Proximity Marketing accordingly requests the Commission to issue such a clarification.

If the Commission does not grant this Request for Clarification before the *Report and Order* becomes effective, then the changes adopted in the *Report and Order* will, overnight, radically alter the Requester Publication industry. These changes, including elimination of the

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<sup>17</sup> Compare *Report and Order* at para. 191 (consent for faxed advertising can be obtained through interaction with customers in a store).

<sup>18</sup> *Report and Order* at para. 185, citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (Report and Order), 7 FCC Rcd 8752, 8779, para. 54, n. 87 (1992) (“1992 TCPA Order”). That is not to say, however, that related issues did not arise, such as threats of class action law suits and frivolous law suits. See e.g., Comments of American Business Media, filed November 22, 2002, at pages 4-5.

<sup>19</sup> For example, Proximity Marketing has received numerous inquiries from its publisher clients as to what the Commission’s action means and its impact on publishers’ business operations.

established business relationship presumption and the new requirement for express signed written consent from the recipient of faxed advertising, will have an immediate and adverse impact on publishers and the marketing companies that assist publishers in communicating with their subscribers (such as Proximity Marketing). Absent the requested clarification, to continue sending faxed renewal notices to their subscribers, publishers may (or will) need to obtain, prior to August 25, the signed written permission of their subscribers.<sup>20</sup>

There are tens or hundreds of millions of subscribers to free Requester Publications.<sup>21</sup> It will severely disrupt the publishers' and marketing companies' business operations and create significant economic hardship to have 4,000 publications all contacting millions of subscribers within the brief period before the *Report and Order* is effective, to the extent such massive communications are even possible. If consents are not obtained prior to August 25, and publishers are no longer able to communicate by fax with subscribers concerning the status of their subscription, publishers and marketing companies will experience a severe adverse economic impact from a reduction in subscribers and related business.<sup>22</sup>

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<sup>20</sup> See 47 C.F.R. Section 64.1200(a)(3)(i), as amended (*Report and Order*, Appendix A). Although the effective date of this amended rule is pending OMB approval, for all practical purposes publishers will need to obtain the written consent from their subscribers given the elimination of the established business relationship exemption as of August 25. It also is unclear whether, after August 25, publishers may even use facsimile communications to obtain written consent to send facsimile advertisements. See *Report and Order* at para. 193 ("facsimile requests for permission to transmit faxed ads, including toll-free opt-out numbers, impose unacceptable costs on the recipients. This kind of "negative option" is contrary to the statutory requirement for prior express permission or invitation").

<sup>21</sup> Assuming a minimum of 15,000 subscribers to all 4,000 Requester Publications, there would be 60 million individual subscriptions. However, as noted previously, some publications may have as many as 250,000 subscribers. See *infra* at page 3. Thus, there are far more than 60 million subscriptions implicated.

<sup>22</sup> These hardships and burdens are discussed at greater length in Proximity Marketing's concurrently filed Request for Stay.

Thus, if the Commission fails to clarify prior to August 25, that faxed communications to existing subscribers requesting renewal confirmation are not advertising, the Commission should stay the effective date of its new rules until the later of six months from August 25, or Commission action on petitions for reconsideration of the *Report and Order*. This would at least provide a more reasonable period for publishers to contact their subscribers, obtain consent to continue communicating by fax, and implement procedures that comply with the new rules.

### **CLARIFICATION REQUEST:**

#### **FAXED COMMUNICATIONS REQUESTING SUBSCRIBERS TO CONFIRM THEIR SUBSCRIBER STATUS ARE NOT ADVERTISING**

The TCPA prohibits only the transmission of “an unsolicited advertisement to a telephone facsimile machine.”<sup>23</sup> The TCPA does not prohibit other faxed communications. Under the TCPA, an “unsolicited advertisement” is “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.”<sup>24</sup> The Commission has adopted the same definition.<sup>25</sup> The limited question posed in this Request for Clarification is whether a faxed communication from the publisher of a Requester Publication to a subscriber who receives a free subscription, requesting the subscriber to confirm that he or she wants to continue receiving the publication free of charge, is an “unsolicited advertisement” under the TCPA.

The answer to this question necessarily depends on the interpretation of the phrase “advertising the commercial availability or quality of any property, goods, or services.”<sup>26</sup> If the

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<sup>23</sup> 47 U.S.C. Section 227(b)(1)(C).

<sup>24</sup> 47 U.S.C. Section 227(a)(4).

<sup>25</sup> 47 C.F.R. Section 64.1200(f)(10), as amended in the *Report and Order*.

<sup>26</sup> Given the Commission’s reversal as to whether an established business relationship provides the requisite consent to receive a facsimile advertisement, and its new rule requiring signed

faxed communication does not pertain to the “commercial availability” of a good or service, or if it is not an “advertisement” of “commercial availability” or the “quality of any property, goods, or services,” then it is not subject to the TCPA’s prohibition.

Examining the common definitions of the key terms demonstrates that a faxed communication from a publisher to an existing subscriber, notifying the subscriber that his or her subscription is about to expire, and requesting confirmation that he or she wishes to continue receiving the publication, is outside the scope of the TCPA.<sup>27</sup>

**Commercial Availability.** Commercial is generally defined as occupied with, engaged in, or relating to commerce.<sup>28</sup> Commerce is generally defined for these purposes as “the exchange or buying and selling of commodities on a large scale involving transportation from place to place.”<sup>29</sup> Thus, commercial availability generally refers to the availability of a good, product or service that is for purchase or sale. A faxed communication inquiring whether a subscriber wishes to continue receiving a free publication does not, therefore, pertain to the

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written consent to the receipt of facsimile advertisements, the question of whether the subscription renewal notices are “unsolicited” is beyond the scope of this Request for Clarification and is more appropriately addressed on reconsideration of the *Report and Order*.

<sup>27</sup> It is noted that many subscriptions to Requester Publications may be in the name of a business, rather than an individual. Nonetheless, to comply with postal regulations, documentation of the business’ desire to continue receiving the subscription is required, and would be provided by an individual associated with the business. Of course, the Commission’s new regulations raise questions as to who the appropriate person is to consent to receiving facsimile communications concerning such a subscription, and the publisher’s ability to communicate with the business if that person leaves or is replaced.

<sup>28</sup> All definitions referenced above are taken from Merriam-Webster’s On-Line Dictionary, available at <http://www.m-w.com/cgi-bin/dictionary>.

<sup>29</sup> *Ibid.* An alternate definition, plainly not relevant for these purposes, is “social intercourse: interchange of ideas, opinions, or sentiments.”

“commercial availability” of that publication. The subscriber is not being asked to purchase the publication, nor is the publisher offering to sell anything to the subscriber.<sup>30</sup>

**Advertisement.** An advertisement refers to the act or process of advertising.<sup>31</sup> Advertising generally refers to making something known (notifying), or calling public attention to something, “especially by emphasizing desirable qualities so as to arouse a desire to buy or patronize” (promoting).<sup>32</sup> It is reasonable to assume that in enacting the TCPA Congress intended to address the promotional aspect of advertising; that is, efforts to sell the item advertised. Indeed, this is how the Commission has applied the term. Thus, in the context of telemarketing calls, the Commission has stated that “[i]f the call is intended to offer property, goods, or services for sale either during the call, or in the future (such as in response to a message that provides a toll-free number), that call is an advertisement. Similarly, a message that seeks people to help sell or market a business’ products, constitutes an advertisement if the individuals called are encouraged to purchase, rent, or invest in property, goods, or services, during or after the call.”<sup>33</sup>

Thus, the key elements of an advertisement are that it makes something known with the intent or for the purpose of selling the item advertised. As with “commercial availability,” the focus is on activity seeking to promote the purchase or sale of a good, product or service. In the context of faxed communications to subscribers concerning a publication they requested and

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<sup>30</sup> That is not to say that a Requester Publication is not implicated in commerce, only that the specific communication between the publisher and a subscriber, which does not involve the offer for sale or purchase of a subscription (or any other product or service), does not constitute “commercial availability” for purposes of the TCPA.

<sup>31</sup> See footnote 26.

<sup>32</sup> See footnote 26.

<sup>33</sup> *Report and Order* at para. 142 (emphasis added).

receive, the recipient of the fax is plainly already aware of the publication. When a subscriber is requested to renew a free subscription there is no purchase or sale involved.<sup>34</sup>

Rather than “advertising” the “commercial availability” of a publication, the faxed renewal reminders are essentially an exchange of information. The publisher is reminding the subscriber that his or her subscription is about to expire. The subscriber, in turn, is notifying the publisher of his or her desire to continue to receive the publication and is providing the needed responsive information. There is no purchase or sale.<sup>35</sup>

In an analogous context, the Commission has determined that a telemarketing message inviting a consumer to listen to or view a radio or television broadcast is permitted under the Commission’s revised telemarketing rules. The Commission considers such a message a call “that does not include or introduce an unsolicited advertisement or constitute a telephone solicitation.”<sup>36</sup> This issue arises in the context of the TCPA provision prohibiting the delivery of prerecorded messages to a residential telephone line without the prior express consent of the called party, and the Commission’s exemption from this prohibition for calls made for a commercial purpose but which do not include any “unsolicited advertisement.”<sup>37</sup> Thus, the Commission recognizes that communications with a consumer may have a commercial purpose

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<sup>34</sup> Nor is the free subscription linked to an overall marketing campaign to sell any other property, goods or service to the subscriber. *Compare Report and Order* at para. 140 (“[o]ffers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services constitute ‘advertising the commercial availability or quality of any property, goods, or services’”) (footnote omitted).

<sup>35</sup> *Compare Report and Order* at para. 155, n. 553 (a message limited to identification information only is not considered an “unsolicited advertisement” under the Commission’s telemarketing rules).

<sup>36</sup> *Report and Order* at para. 145. The definition of “unsolicited advertising” is the same for purposes of applying the telemarketing and unsolicited facsimile advertising provisions of the TCPA and the Commission’s Rules. See 47 U.S.C. Section 227(a)(4) and 47 C.F.R. Section 64.1200(f)(10).

<sup>37</sup> See 47 U.S.C. Section 227(b)(1)(B) and 47 C.F.R. Section 64.1200(c)(2).



but not constitute advertising. The Commission went on to caution, however, that if the message is part of an overall marketing campaign that encourages the purchase of goods or services, or that describes the commercial availability or quality of any goods or services, then it is an “advertisement” under the TCPA.<sup>38</sup>

In the context of electronic media (radio and television), the Commission has determined that inviting a consumer to listen to or view a program is permitted as long as it does not encourage the purchase of or describe the commercial availability of goods or services. There is no rational basis to distinguish such an invitation from a notice to the subscriber of a publication that his or her subscription is about to expire and which invites the subscriber to continue receiving the publication, free of charge. In both cases, the viewer, listener or subscriber is neither required nor encouraged to purchase any good, product or service.<sup>39</sup>

This analogy is particularly appropriate for Requester Publications. The Commission has distinguished between invitations to listen to or view broadcast programming that is free (*e.g.*, over-the-air broadcasting), versus paid programming (*e.g.*, cable or direct broadcast satellite).<sup>40</sup> There is no rational basis for making this distinction in the context of broadcasting, but not making it for Requester Publication subscriptions that are provided for free, versus paid subscriptions to general circulation or other publications.<sup>41</sup>

## CONCLUSION

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<sup>38</sup> *Report and Order* at para. 145.

<sup>39</sup> Just as advertising-supported over-the-air broadcasters want to maximize their audience to achieve higher ratings and increase their attractiveness to advertisers, so too do Requester Publications, which also are advertiser-supported, want to maximize the number of their subscribers.

<sup>40</sup> *Report and Order* at para. 145, n. 499.

<sup>41</sup> An interpretation of the Commission’s rules that discriminates in this manner between broadcast and print media would raise significant constitutional issues.

It is important to remember that Proximity Marketing's request for clarification is limited solely to faxed communications from the publisher of a Requester Publication to a subscriber that has (1) previously requested to receive the publication, and (2) pays nothing for the subscription, with "no strings attached." The faxed communication is limited to notifying the subscriber that his or her subscription is about to expire, and requests the subscriber to provide responsive information to the publisher to continue receiving the free subscription.<sup>42</sup> Publishers are required to obtain this information, in written form, to comply with U.S. Postal regulations governing the eligibility for reduced Periodical mailing rates, and for independent circulation audits. Within these specific parameters, there is no reasonable basis for characterizing such communications as "unsolicited facsimile advertising" as that term is defined in the TCPA and the Commission's Rules. Proximity Marketing therefore requests the Commission to issue an immediate clarification that such faxed communications are not prohibited under the TCPA and do not require signed written consent from the recipient pursuant to Section 64.1200(a)(3)(i) of the Commission's Rules as amended in the *Report and Order*.

Respectfully submitted,

By: /s/  
Mark Van Bergh

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<sup>42</sup> Proximity Marketing recognizes that if a faxed communication also includes a promotion or offer for the subscriber to purchase some other product or service, in addition to continuing the free subscription, then it would change the character of the communication and it would fall within the purview of the TCPA's prohibitions as interpreted by the Commission. Although Proximity Marketing believes there are other flaws concerning the *Report and Order* in this regard, they are beyond the scope of this Request for Clarification, and may be addressed in a petition for reconsideration.

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Its Attorney

Dated: August 6, 2003

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<sup>43</sup> Note that counsel for Proximity Marketing is in the process of relocating his Washington, D.C. law office. The address and telephone number provided are temporary for this transition period.

## **EXHIBIT A - LETTERS**



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August 1, 2003

Chairman Michael K. Powell  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
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Chairman Powell:

I am writing to express my concerns about the severe financial impact the new fax regulations will have on the business-to-business publishing industry, particularly circulation subscription maintenance. As someone who has received irritating, relentless faxes in the past, I completely agree that legislation is necessary to regulate the abuse of this method of communication. However, the new regulations are not only ambiguous in nature but will require significantly more than the 30 day allotted time period to be implemented correctly.

I am the Director of Circulation and Database Operations at GIE Media, a publisher of several trade magazines in the lawn care, pest control, and recycling markets. We have over 100,000 subscribers to our magazines that receive their monthly issues on a complimentary basis. Like the majority of trade magazines, we do not charge for the subscriptions but we are required to contact subscribers once a year to confirm that they want to continue receiving the publication. When subscribers initially request their free subscriptions, they are only required to provide a valid mailing address so that we can mail the publication to them. We do give them the option of providing a phone number, fax number, and email address for correspondence purposes. However, they are not required to provide this information in order to receive the magazine. Once they have received the publication for a continuous period, we need to contact them to verify that they wish to continue receiving the magazine as well as update their business information. Again, we do not charge a fee for the subscriptions; we simply verify that they want to continue receiving our publication. This is done through a series of efforts including direct mail, faxing, and telemarketing. Faxing has proven to be the most efficient, cost-effective, and least intrusive method of contacting our subscribers and is an essential tool for communicating with them.

GIE Media has great respect for our subscribers and the existing fax regulations. These types of faxes are only sent to people already active recipients of our magazines. If at any time a subscriber requests that we do not contact him by fax, that number is added to a suppression file and removed from all future fax projects. In addition, GIE Media does not release subscriber fax numbers to 3<sup>rd</sup> parties.

#### PRINT COMMUNICATIONS

C&D Recycler  
Lawn & Landscape  
Pest Control Technology  
Recycling Today  
Service Technician

#### INTERNET COMMUNICATIONS

[lawnandlandscape.com](http://lawnandlandscape.com)  
[pctonline.com](http://pctonline.com)  
[recyclingtoday.com](http://recyclingtoday.com)  
[fibremarketnews.com](http://fibremarketnews.com)

#### CONFERENCES

C&D Management Forum  
Lawn & Landscape Business Strategies  
Lawn & Landscape School of Management  
Paper Recycling Forum  
PCT Dialogue

**[www.giemedia.com](http://www.giemedia.com)**

The costs required to comply with these new regulations by August 24<sup>th</sup> will put a severe financial strain on our company. Since we are already halfway through our calendar year, many of our customers have already been contacted and we will not need to contact them again until next year. However, in order to get permission to fax them by August 24<sup>th</sup>, we will need to contact all of them again immediately. If we have to contact 100,000 people at roughly \$.13 fax, the cost to simply request permission to fax them in the future will be over \$10,000. However, if we are given a year to obtain permission from all of our subscribers, we can request this permission during the annual update and not irritate them with unnecessary faxes that are not relevant to their subscription status.

In addition, this new regulation will increase our costs significantly in the future. On average, we update about 30,000 subscriptions each year through fax communication. The average cost to our company for each faxed response is about \$.60 for a total of \$18,000/year spent on faxing. The alternative to faxing is telephone verification. The average cost for each telephone verification is \$3.75. If we are forced to contact our subscribers by phone instead of fax, this has the potential to increase our costs by over \$90,000 in a single calendar year. Further, most new subscriptions are qualified over the telephone. Since the new regulations require that we receive permission to fax our subscribers in writing, we will not be able to obtain permission during the phone call and will be pushed into a cycle of calling subscribers each year instead of communicating with them in a more efficient, less expensive manner.

My request at this time is that you extend the deadline for compliance to August 24<sup>th</sup>, 2004 so that we have time to obtain permission from our subscribers during the standard verification process. I also ask that you examine these regulations for practicality. In this day and age, businesses rarely see their customers and it is difficult to obtain a written signature on a piece of paper. Please consider a verbal agreement obtained over the telephone along with a personal identifier for verification to be an acceptable source of authorized permission.

In closing, I realize this is a complicated issue and I trust that the FCC will take the time to examine the financial impact this legislation will have on the publishing industry. Thank you for your time.

Regards,

A handwritten signature in black ink that reads "Heidi Spangler". The signature is written in a cursive, flowing style.

Heidi Spangler  
Director, Circulation and Database Operations  
GIE Media, Inc.